Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of The Western Pacific Railroad Company, a corporation, dated June 26, 1926,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation,
Respondent.

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Petitioner.

vs.

FREDERICK H. ECKER, *et al.*,
Respondents.

BRIEF ON BEHALF OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

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October 1, 1942.

INDEX

Table of Cases

Table of Statutes

OTHER AUTHORITIES

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BRIEF ON BEHALF OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

Foreword

The views of The Western Pacific Railroad Company (herein called the Debtor) upon the fundamental questions

now arising in this Court under Section 77 of the Bankruptcy Act (herein referred to as Section 77) are in complete accord with those presented in the brief of Western Pacific Railroad Corporation, which is the Debtor's sole stockholder and the beneficial owner of all of the Debtor's unsecured indebtedness.[1]

In order to avoid duplication of argument the Debtor, therefore, adopts in its entirety the brief filed herein by Western Pacific Railroad Corporation.

In addition, and for reasons hereinafter stated, the Debtor adopts as correctly expressing the position which the Debtor conceives it to be its duty to take in respect of conflicting lien claims asserted herein, the brief filed by Irving Trust Company, as Trustee of the Debtor's General and Refunding Mortgage.

Scope of the Debtor's Brief

This brief assumes affirmance by this Court of the decision of the Circuit Court of Appeals herein and a reference of this proceeding back to the Interstate Commerce Commission pursuant to subsection (e) of Section 77 on the basic grounds developed in the brief of the Western Pacific Railroad Corporation, and is intended (a) to supplement that brief in the discussion of certain questions which this Court may think ought to be settled before the Interstate Commerce Commission undertakes the consideration of a new plan and (b) to add a few further words of confidence in the earning capacity of the Debtor's properties and in the strength and future of the railway industry.

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1. Tr. 1044, 1143.

The Debtor's Status Under Section 77

As this Court is aware, this proceeding was commenced (and we think this also is true of other like proceedings pending in the Courts) by the filing by the Debtor as required by Section 77 of a petition alleging in the language of subsection (a) that it is "unable to meet its debts as they mature and that it desires to effect a plan of reorganization."

Thus at the very outset the Debtor became the moving party in these proceedings and by the express terms of paragraph (13) of subsection (c) invested with "the right to be heard on all questions arising in the proceedings." That this right is a continuing one persisting throughout the proceeding is made clear by Section 77 as a whole and particularly by subsection (f) which provides—

> "* * * Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

As stated in an opinion written by Circuit Judge PHILLIPS for the Circuit Court of Appeals in the Tenth Circuit:

> "Undoubtedly, the debtor has important duties to perform in the reorganization proceedings, *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648, 679, * * * not only in connection with the formulation and presentation of the plan of the debtor but also in connection with the proceeding, the debtor hav-

ing the right to be heard on all questions arising therein."[2]

Since it is the statutory duty of the Debtor to formulate and carry through a reorganization plan which must conform to the meticulous statutory specifications set out and referred to in subsection (e) of Section 77, and since the formulation of such a plan necessarily involves a determination by the Debtor of the status and lien position of every security holder or creditor entitled to participate therein, it cannot perform this statutory duty and discharge its obligations to the Interstate Commerce Commission and the Court if it remain complaisant in respect of a plan proposed by any other party to the proceeding or formulated by the Commission itself which fails either as to creditor or equity interest to conform to any one or more of such statutory specifications. So it seems quite clearly to be the intent of Section 77 that the Debtor serve throughout the proceeding in a *quasi* judicial capacity and to that end have the right to be heard under paragraph (13) of subsection (e) on behalf of any creditor or equity interest whose rights are adversely affected by any feature of a plan certified to a District Court by the Interstate Commerce Commission pursuant to subsection (d). This general duty becomes definite and specific as to any class of creditors which in whole or in part may be otherwise unrepresented in the proceeding.

The holders of a very large part of the Debtor's funded debt are in this situation.

The Debtor has created and there are now outstanding an issue of its First Mortgage Bonds in the amount of $49,290,100, of which $16,941,400 are represented by an

2. *Denver and Rio Grande Western Railroad Company* v. *McCarthy, et al.*, 111 F. (2d) 820.

Institutional Bondholders' Committee,[3] a group of not more than twenty-five members organized under the following exceptive provision of subsection (p) of Section 77—

> "• • • That nothing contained in this section shall • • • prohibit groups of not more than twenty-five *bona fide* holders of securities or claims or groups of mutual institutions from acting together *for their own interests and not for others* • • •." (Italics supplied.)

The limitations of subsection (p) are clear and unequivocal. The Institutional Bondholders' Committee organized under this subsection may represent the $16,941,400 of First Mortgage Bonds owned by members of the group but *may not* represent others, thus leaving $32,348,700 of the same issue of First Mortgage Bonds wholly unrepresented in the proceeding except as they may be represented either by the mortgage trustees in the execution of their trust or by the Debtor in the proper discharge of its duties under Section 77. The authority of the mortgage trustees may, however, be subject to question in view of the *caveat* in paragraph (7) of subsection (c) that "nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization."

In the argument which follows the Debtor is aligned in its technical position with the interest of the holders of the unrepresented First Mortgage Bonds in opposing the proposed violation of their lien priority by the offer of parity of treatment to the secured notes of the Debtor held by Reconstruction Finance Corporation and in opposing the creation of a reorganization committee upon which these Bonds (nearly two-thirds of the entire issue) are accorded no representation; but, for reasons which will be

3. Tr. 1855.

apparent to this Court the Debtor has adopted the brief of the Trustee of the General and Refunding Mortgage as more consistent with its own public representations and as reflecting the definitely sounder view in the lien controversy between the Trustees of the First Mortgage and the Trustee of the General and Refunding Mortgage.[4]

Summary of Argument

I. The effective date of the Plan should be the date of the filing of the Petition.

II. The new Plan should be purged of the discriminatory treatment attempted to be given Reconstruction Finance Corporation.

III. The new Plan should provide for the surrender to the Debtor for restoration to the owners of all accommodation collateral pledged under its secured notes.

IV. The new Plan should be carried out by the Debtor and not by a Reorganization Committee.

V. The Debtor's unsecured creditors and stockholders may not lawfully be excluded from participating in the new Plan.

Argument

I. The effective date of the Plan should be the date of the filing of the Petition.

The first question which ought to be judicially settled for the future guidance of the Interstate Commerce Commission and the Courts is the precise capital structure of a Debtor to which a plan of reorganization under Section 77 should be applied.

4. Tr. 1649.

In the present case, the Interstate Commerce Commission has selected January 1, 1939, as the effective date of the plan certified to the Court and has applied the plan to the capital structure, including interest accrued at contract rates, as it existed on December 31, 1938, but it points to no legal warrant for that particular date.[5] There is no reason why it could not with equal propriety say December 31, 1937, or December 31, 1940, or why it should not project things forward to December 31, 1941, or carry them back to August 2, 1935.[6]

The Debtor says that the plan for its reorganization should be applied to its capital structure as it existed August 2, 1935 (adjusted for accounting purposes to the nearest July 1 or January 1) and it points to subsection (l) of Section 77 as its warrant for that date. The Debtor contends that Section 77 contemplated a prompt reorganization in accordance with a uniform pattern applied to the capital structure as it existed at the basic date of bankruptcy—the date of the filing of the petition—and that this is the plain implication of subsection (l) which provides—

> "In proceedings under this section * * * the rights and liabilities of creditors, * * * shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

5. Tr. 307.

6. In an up to date study of railroad reorganization Plans certified by the Interstate Commerce Commission, issued by the Stock Exchange firm of Pflugfelder, Bampton & Rust, it appears that the following Plans bear the effective dates indicated:

Chicago, Milwaukee, St. Paul and Pacific Railroad Company	—January 1, 1939
Chicago & North Western Railway Company	—January 1, 1939
Akron, Canton & Youngstown Railway Company	—October 1, 1938
Missouri Pacific Railroad Company	—January 1, 1940
Chicago, Rock Island & Pacific Railway Company	—January 1, 1942
Florida East Coast Railway	—January 1, 1942
St. Louis Southwestern Railway Company	—January 1, 1942
St. Louis—San Francisco Railway Company	—January 1, 1940
The Denver and Rio Grande Western Railroad Company	—January 1, 1942
New York, New Haven & Hartford Railroad Company	—January 1, 1940

It is quite clear from the authorities reviewed in *Ticonic National Bank* v. *Sprague*,[7] that the capital structure to be dealt with in reorganization must include the principal of all indebtedness, both secured and unsecured, together with contract interest accrued to the basic date of bankruptcy and that the right to interest *after* that date only survives as to *secured* indebtedness. The following terse but comprehensive statement of the law appears in one of the footnotes to Mr. Justice REED's opinion in that case (p. 413): "*A mortgagee shall have his interest run on* upon a bankrupt's estate, because he hath a right in rem, *but as to other interest, it ceaseth on the bankruptcy.* Per Ld. Chan. King, 18 July 1729." In effect, therefore, the filing of a petition under Section 77 is an impounding of subsequent income for the liens under which it was earned. This also is the clear import of this Court's decision in *Sexton* v. *Lloyds Bank*.[8]

In the case now before this Court, the petition was filed August 2, 1935, and the effective date which the Interstate Commerce Commission has assigned to the plan is January 1, 1939.[9] Accordingly, the creditors are to receive upon their principal obligations, either in cash or securities, interest accrued at existing contract rates up to August 2, 1935, and thereafter until January 1, 1939; but for the period *after* January 1, 1939 (to the extent that their creditor status is permitted to survive) they are to receive interest accrued at the rates to be prescribed in the new securities. The result of this is that for approximately three and one-half years out of the seven years elapsed since August 2, 1935, the lien and secured creditors are to

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7. 303 U. S. 406.

8. 219 U. S. 339.

9. Tr. 307.

be given recognition for interest on the basis of the pre-bankruptcy contract, and for the three and one-half years of the same seven year period (*i. e.* from January 1, 1939 to date) their interest adjustment will be on the basis of the new or substituted contract; but for neither of these two periods do they receive what the law gives them—the income actually earned under their respective liens.

The Debtor submits that reorganization plans under Section 77 should be made effective as of the date of the filing of the petition as contemplated by subsection (l) and that the rights of all parties in respect of subsequently accruing interest shall be in accordance with the terms of the substituted securities which they are allotted in reorganization. This will avoid tedious segregation or mortgage section studies of income earned *pendente lite* and will give to interest accruing after basic date the same treatment as is accorded principal and is fair and equitable if the plan itself is sound. No one could criticize as unfair and inequitable a plan otherwise sound which gives identical treatment to both principal and interest. No one could, in our view, contend, however, that a plan is not fundamentally wrong which treats interest for part of the administration period on one basis and for another part of the administrative period on a different basis but ignores in each case the actual income lawfully impounded as applicable thereto.[10]

There is no real problem in formulating a plan as of the basic date of bankruptcy and then carrying the plan for-

10. Whether a secured creditor may stand on his lien for both principal and interest and at the same time participate in the general estate presents a grave question under the Bankruptcy Act which need not be here considered. The rule seems to be settled that a secured creditor cannot prove his entire claim in bankruptcy without surrendering or abandoning his security. (*In re O'Gara Coal Company*, 12 F. [2d] 426.) The mortgage creditors who participate in a reorganization under Section 77 might logically be held to be subject to the same disability without thereby running counter to what heretofore has been deemed fair and equitable in a court of bankruptcy.

ward to any subsequent date selected as convenient and in utilizing for interest adjustments for the post-bankruptcy period the same securities as are given for principal as of basic date. Experienced railway accountants will readily make all of the adjustments and readjustments necessary to carry the capital structure forward to any given date and to expand it by issuing new capital securities in lieu of income that it may be necessary to withhold from distribution. Such a situation is well illustrated by the case now before the Court. As will be shown hereafter approximately $10,000,000 of Trustees' Certificates mature December 1, 1942, and ample funds representing income earned during trusteeship appear to be available for their payment. The use of the cash for this purpose (we shall show hereafter that the law makes its use mandatory) will, however, render impracticable any substantial cash distribution to holders of the new securities issuable under the plan. Additional new securities of precisely the same character as are to be issued under the plan in respect of principal and accrued interest at basic date will of necessity be issued in respect of such part of the $10,000,000 fund as would have been distributed on the new securities so issued if the fund had not been used to pay the Trustees' Certificates. So the holders of new securities will receive for interest after basic date exactly what they receive for interest up to basic date.

Should it be contended here that the provision of subsection (1) fixing all rights as of the date of the filing of the petition, if held to establish the basic date for a plan of reorganization, is inconsistent with the provision of subsection (e) that a finding of *no value* for a *stratum* of debt or for a class of stock in order to exclude it from the right to vote upon a plan of reorganization shall give effect to the value of the estate at "the time of the finding" it is

submitted that the contention is without merit. No inconsistency exists. The provision of subsection (e) is merely a recognition of the constitutional rule that a valuation involving possible confiscation must be on a current basis or equated to a current basis. It does no more than assure a class excluded from a plan predicated upon obsolete values the right to vote down such plan and to require the formulation of a new plan on the basis of current values. The new plan would bear the same date as the original plan corresponding to the date of bankruptcy but would establish rights translated into new securities reflecting true values instead of depression values and would give the precise relief contemplated by Section 77.

But if the Court shall conclude that a lawful plan may be formulated on the basis of the Debtor's funded debt with the capital structure moved forward and interest added to a date subsequent to bankruptcy at contract rates regardless of whether it was earned or unearned, and if earned regardless of where earned, then we submit that the plan should be moved forward to the latest practicable date which, if it be the January 1 or July 1 following the date of certification of the plan to the District Court could conveniently be made to coincide with the actual date of judicial confirmation.

II. The new Plan should be purged of the discriminatory treatment attempted to be given Reconstruction Finance Corporation.

Reconstruction Finance Corporation is the owner and holder of approximately $10,000,000 principal amount of Trustees' Certificates representing a debt incurred by the Trustees, as officers of the Court, and not by the Debtor, but constituting a first and paramount lien upon all of the Debtor's railways and other

properties and, in addition, Reconstruction Finance Corporation is the owner and holder of the Debtor's collateral notes in the principal amount of $2,963,000, secured by the pledge, among other things, of $11,750,000 principal amount of the Debtor's General and Refunding Mortgage Bonds which, under the decision of the Interstate Commerce Commission—a decision accepted by the District Court but not dealt with on this point by the Circuit Court of Appeals—are for all practical purposes subordinate to the lien of $49,290,100 principal amount of the Debtor's First Mortgage Bonds. Nevertheless, the Interstate Commerce Commission in the Plan certified to the District Court advanced or elevated the claim of Reconstruction Finance Corporation represented by the Debtor's notes in the principal amount of $2,963,000, so that this claim is given parity of treatment with the holders of the Debtor's First Mortgage Bonds. This discriminatory treatment of the claim of Reconstruction Finance Corporation, so plainly violative of the rule of strict priority, is sought to be justified upon the theory that Reconstruction Finance Corporation is to aid consummation of the Plan by buying at par (or accepting at par in exchange for its Trustees' Certificates in like principal amount) $10,000,000 principal amount of First Mortgage Bonds of the reorganized Company, bonds which witnesses undertook to testify would not be worth, when issued, more than 90% of their face.[11] The difficulties here are threefold: first, there is no commitment whatsoever on the part of Reconstruction Finance Corporation to buy the new Bonds at par or at any other price (nor any commitment to exchange the Trustees' Certificates for the new Bonds); secondly, it was quite impossible for any witness to place a dependable value upon new Bonds to be

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11. Tr. 1530, 1537.

issued, one, two or three years hence; and, thirdly, neither the Interstate Commerce Commission nor the Court made any finding as to the amount of the claimed deficiency of which the expectation of financial aid from Reconstruction Finance Corporation was assumed to be the "equitable equivalent." Such an expectation is not a valid consideration to support the displacement or dilution of senior liens. If the new Bonds at the time of issue are not worth par, the Reconstruction Finance Corporation need not buy them and the reorganization may fail. If the new Bonds are worth par, then the Reconstruction Finance Corporation becomes the beneficiary of any premium and the unlawful discrimination in its favor is aggravated.

This question will in all probability be academic if either of the two major lien claims are decided *against* the First Mortgage and in favor of the General and Refunding Mortgage in accordance with the brief of Irving Trust Company, adopted by the Debtor, because such a decision would indicate a collateral value for the General and Refunding Mortgage Bonds pledged as security for the $2,963,500 of the Debtor's notes held by Reconstruction Finance Corporation sufficient to entitle such notes to payment in cash or at least to parity of treatment with the Debtor's First Mortgage Bonds.

Moreover, changed economic conditions since the Commission's Plan was formulated appear to have so improved the cash position of the Trustees as to assure ample funds for the payment of the Trustees' Certificates at their maturity on December 1, 1942. Indeed, $6,000,000 has been deposited as dollar collateral for these Trustees' Certificates in consideration of the abatement of all interest on $6,000,000 of the principal indebtedness represented there-

by.[12] Assuming that an extension of the Trustees' Certificates at their maturity on December 1, 1942, is the legal equivalent of a new loan (we cannot see how it can be treated otherwise) an extension becomes inadmissible because (a) Trustees' Certificates secured by dollar collateral would be readily marketable among banks and like investors at a very low interest rate and it would not be possible truly to certify as required by Section 5 of the Reconstruction Finance Corporation Act that the money cannot be obtained on reasonable terms in ordinary channels, and (b) Trustees' Certificates may only be lawfully issued in derogation of existing liens for a very limited number of purposes which do not include the maintenance of a large cash fund greatly in excess of essential working capital.

Should it become necessary, however, to look to Reconstruction Finance Corporation for any cash to be provided under a new plan of reorganization by the sale of Bonds of the reorganized Company and to give it preferred treatment in consideration thereof, it is submitted that there must be included in the arrangement a factor which does not now exist—there must be included therein a binding commitment on its part to perform the undertaking which is the consideration for such preferred treatment, subject only to such authorization as may be required by law.

III. The new Plan should provide for the surrender to the Debtor for restoration to the owners of all accommodation collateral pledged under its secured notes.

In the late depression period when the Debtor was endeavoring to protect interest payments upon its First Mortgage Bonds and at the same time finance the completion of the Northern California Extension, the A. C. James Co. loaned

12. Statement of System Operating Results for July, 1942, dated September 16, 1942. The Trustees have applied for instructions as to the action to be taken at the maturity of the Certificates and have forecast available cash for payment amounting to approximately $12,000,000.

the Debtor certain collateral which was pledged by the Debtor to Reconstruction Finance Corporation and The Railroad Credit Corporation with full knowledge on the part of these pledgees that they were receiving accommodation collateral. The Commission's original report provided:

> "The plan should provide, however, that its approval and confirmation in no wise disturbs or alters the rights of the Reconstruction Finance Corporation and the Railroad Credit Corporation in collateral pledged with them by parties *other* than the debtor."[13]

> "The plan should provide further that all collateral pledged by the debtor as security for its notes to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company shall be surrendered to the reorganized debtor."[14]

In substance, the Commission provided that the collateral owned and pledged by the Debtor should be surrendered to the reorganized Company but that the accommodation collateral borrowed from others and pledged by the Debtor should be confiscated; or, to state the proposal somewhat differently, the accommodation collateral is to be resorted to first instead of last as is required by the most elemental principles of equity and by the authorities cited below.[15]

The Institutional Bondholders' Committee requested certain modifications of the original report of the Interstate Commerce Commission, including a modification requiring

13. Tr. 271.

14. Tr. 280.

15. 49 Corpus Juris, 982, 986;
Commercial Nat. Bank v. *National Surety Co.*, 259 N. Y. 181;
Matter of Cooke, 147 Misc. 528;
Robinson v. *Roe*, 233 Fed. 936.

that "all collateral pledged by others than the Company * * * be surrendered to the pledgors thereof."[16] The Debtor itself proposed that the following provision be inserted in any plan approved by the District Court:

> "All collateral pledged by others than the Company as security for the Company's notes to R.F.C., R.C.C. and A.C.J. shall be surrendered to the pledgors thereof, and all collateral pledged by the Company as security for said notes shall be surrendered to the New Company and cancelled, except that R.C.C. shall not release or surrender any right or interest in the distributive shares of the Company or its subsidiaries under the Marshaling and Distributing Plan, 1931, but any proceeds from such distributive shares after the effective date of the Plan, shall become the property of and be retained by the R.C.C., but to the extent to which received prior to the issue of the new securities under the Plan shall be applied in reduction of the claim of the R.C.C. in respect of which such new securities are to be issued at the rates provided in Article IV."[17]

The Interstate Commerce Commission declined to approve the proposal that all collateral pledged by others than the Debtor be surrendered to the pledgors thereof.[18] The learned District Court did not deal with this subject correctively or otherwise. The suggestion was made in the District Court and in the Circuit Court of Appeals, and we understand it is repeated here, that the District Court has no jurisdiction under Section 77 to deal with the accommodation collateral. This is a strange suggestion. Why a party who loans the Debtor collateral instead of money is not a creditor of the Debtor entitled to the protection of the

16. Tr. 812.

17. Tr. 878.

18. Tr. 345.

bankruptcy court is not at all clear. In the new plan a provision for the restoration of the accommodation collateral to the owners as proposed by the Debtor, which is a provision identical in principle with the one proposed by the Institutional Bondholders' Committee, should be included.

IV. The new Plan should be carried out by the Debtor and not by a Reorganization Committee.

Provision is made in the plan certified by the Interstate Commerce Commission to the District Court for a reorganization committee consisting of three members, one appointed by the Institutional Bondholders' Committee, one by Reconstruction Finance Corporation, and one jointly by the Debtor's two remaining holders of secured notes.[19] It may be noted in passing that inasmuch as the Institutional Bondholders' Committee represents only $16,941,400 out of $49,290,100 of First Mortgage Bonds, no recognition or voice in reorganization is given to $32,348,700 of First Mortgage Bonds which the Committee does not represent.[20] Moreover, it seems quite evident that the creditor position of Reconstruction Finance Corporation is in process of rapid liquidation.

If there is to be a reorganization committee under the new plan it should, we submit, be more distinctively representative than the Committee provided for in the Commission's Plan.

There may be cases, but this is not one of them, where a reorganization committee can serve a useful purpose.

Here the reorganization committee is assigned two general functions—

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19. Tr. 395.

20. Tr. 1855.

First—To determine the form and character of the securities and incidental instruments created and executed under the plan, and

Second—To name the first board of directors of the reorganized Company.

The first of these functions is largely theoretical. The form and character of the securities will appear in great detail in the orders of the Commission but if and to the extent that features are left open they will necessarily conform to standards recognized and accepted by creditor interests. Whether there is or is not a reorganization committee, such problems will be solved in conference by counsel representing the parties to the present proceeding. Little will be gained by giving these same counsel an additional title as counsel for a reorganization committee. If differences between parties are not solved in conference they should be reconciled by the Judge and not committed to the decision of a reorganization committee of the character here proposed.

The second of these functions—the one involving the selection and setting up of the first board of directors of the reorganized company—is of greater practical significance.

At or near the end of the Commission's final report dated June 21, 1939, among the sections dealing with matters of mechanics and detail, is the following paragraph under the caption,

"*Management*"

"Under the modified plan of the bondholders' committee the board of directors of the reorganized

company would consist of not less than 7 nor more than 11 members, who would be elected by the stockholders of the reorganized company at an election to be held not later than 90 days after the consummation of the plan. Pending such election the board of directors would consist of such persons as may be designated by the reorganization committee with the approval of the court.

Conclusion.—We find that the foregoing provisions should be incorporated in the modified plan."[21]

Persons unfamiliar with the technique of corporate control would attribute no real importance to a temporary board of directors which is to be superseded by a definitive board elected by the stockholders within ninety days. They would assume all functions of such interim board to be wholly within the category of what is strictly routine. With but a single exception this assumption would perhaps be quite correct. This exception is the function of the temporary board to name the proxy committee which will officially solicit proxies to be voted by the management for the permanent board to be elected by the stockholders. Its exercise will, of course, enable the reorganization committee to dictate the composition of the permanent board which in turn will name the proxy committee for the stockholders' meeting to be held in the following year. This process, repeated from year to year, will assure due maintenance and preservation in corporate control and management of a sound "apostolic succession."

Since a majority of the reorganization committee will be named by the Institutional Bondholders' Committee in conjunction with Reconstruction Finance Corporation, we set out in the subjoined footnote the constituents of the

21. Tr. 354.

group which the Committee represents.[22] From this it appears that by reason (a) of ownership of $9,852,400 out of $16,941,400 of the group Bonds by the Metropolitan Life Insurance Company and The Prudential Insurance Company of America, and (b) the composition of the Committee itself, one of its three members being the Chairman of the Board of the Metropolitan Life Insurance Company and another being the Financial Vice President of The Prudential Insurance Company of America, complete control of the Institutional Bondholders' Committee rests in these two insurance companies. Upon liquidation, which seems imminent, of the loans held by Reconstruction Finance Corporation, it will, of course, cease to be a factor, leaving the control of the reorganized Company safely lodged in the Metropolitan Life Insurance Company and The Prudential Insurance Company of America.

Without intending to reflect in the slightest degree upon these splendid institutions the Debtor submits that such a result is out of line with the underlying purpose and intent of Section 77 and that in proceedings under that Section a reorganization committee should be the exception and not the rule. At least this should be the governing principle in those cases (of which we maintain the present case is pre-eminently one) where the value and earning power of the Debtor's properties require that recognition be given to existing stockholding interests. Continuity of management and a minimum disruption of organization and sacrifice of *esprit de corps* are the very

22. Metropolitan Life Insurance Company $6,852,400.00
The Prudential Insurance Company of America 2,000,000.00
The Chase National Bank of the City of New York
As Owner 25,000.00
as Pledgee 4,464,000.00
The Travelers Insurance Company 200,000.00
New York Life Insurance Company 1,300,000.00
The Mutual Benefit Life Insurance Company 500,000.00
Home Life Insurance Company 300,000.00
John Hancock Mutual Life Insurance Company 300,000.00

essence of the relief to debtors contemplated by Section 77. For these reasons the Debtor urges that in any new Plan all the present provisions for a reorganization committee should go into the discard and the Debtor be expressly authorized to "put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge" as provided in subsection (f) of Section 77.

V. The Debtor's unsecured creditors and stockholders may not lawfully be excluded from participating in the new Plan.

In concluding this argument, it may be helpful to the Court if the Debtor presents very briefly and informally its position as to the underlying purposes of Section 77, points out the salient facts of record arranged in sequence bearing upon what the Debtor conceives to be the constitutionally protected value of its properties and then directs attention to the economic changes occurring since the formulation of the Commission's Plan which have revolutionized the railway industry.

Section 77 was approved March 3, 1933, when the world-wide depression was very close to its low point.

By the title of Chapter VIII, of which Section 77 formed a part, and by the text of Section 73, this legislation was declared to be for "the relief of debtors." No one can seriously question therefore that Section 77 was and is a remedial statute subject to liberal construction for the protection and preservation of the property rights of the debtors then in jeopardy.

From the Committee Reports and Congressional debates it is clear that Congress assumed that this objective would be attained by means of speedy and economical reorganizations entirely purged of the evils of the past as

exemplified by the 1928 equity reorganization of The Chicago, Milwaukee and St. Paul Railway Company.[23] Indeed, this Court expressly so states in its opinion in *Continental Illinois Bank and Trust Company* v. *Chicago, Rock Island and Pacific Railway Company.*[24]

Since the Debtor itself had placed the same interpretation upon Section 77, it undertook to prepare and agree with its creditors and stockholders upon a plan which could be carried through without any delay and at a minimum cost to the trust estate. The outline of such a plan was annexed to the Debtor's petition as filed under Section 77 on August 2, 1935.[25] At later stages Plans were filed by other parties in interest.[26]

On October 10, 1938, the Interstate Commerce Commission made its report and order promulgating and approving a plan of reorganization which differed from all plans filed by interested parties and with the exception of a plan released somewhat later for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, is the most drastic plan ever proposed for a major property.[27] On September

23. 131 I. C. C. 615; 282 U. S. 311.

24. 294 U. S. 648.

25. Tr. 8-9, 196.

26. Tr. 196.

27. In The New York Times, April 13, 1941, it appears that in the Commission's Plan for nine major carriers the Commission prescribed annual charges and preferred dividends equivalent to a return under the respective capitalizations (no par value stock taken at $100) as follows:

Chicago & North Western	4.16
Chicago Great Western	4.06
Chicago, Milwaukee, St. Paul and Pacific	3.28
Denver and Rio Grande Western	3.86
Erie (including Chicago and Erie)	4.12
Missouri Pacific	3.95
New York, New Haven & Hartford	4.21
Western Pacific	3.73

This indicates such radical curtailment of senior securities that it will be necessary for the reorganized Western Pacific to earn only 3.73% on such revised capitalization when earnings begin to flow through to the Common Stock.

28, 1939, after various proceedings, including entry of a report and order modifying in minor features its original report and order, the Interstate Commerce Commission certified this drastic plan to the District Court.[28]

It may be observed in passing that what the Interstate Commerce Commission construed as a Congressional demand for drastic reorganizations wiping out equities and junior debt was merely an expression of the ephemeral political views of individual members.[29] This was demonstrated by the subsequent passage of the Chandler Act of July 28, 1939, under which financial readjustments liberal in their provisions for the preservation of equities were carried into effect by the Baltimore and Ohio Railroad Company and the Lehigh Valley Railroad Company.[30] A voluntary financial readjustment without the aid of any legislation was recently perfected by the Boston and Maine Railroad Company, leaving its stock undisturbed.[31]

At December 31, 1938—January 1, 1939, the latter being the effective date assigned to the plan, the Debtor's total outstanding bonds and secured notes, together with $10,000,000 of Trustees' Certificates constituting a paramount lien on the entire trust estate, amounted to $87,712,654. The Debtor has consistently urged and now confidently submits that its properties valued as of that date in accordance with the law of the land represented a sound income producing investment of not less than $120,000,000 (after applying full straight line depreciation to all depreciable property), indicating a residuum of constitu-

28. Tr. 194, 300, 1034-5.

29. Transcript of hearings before Judiciary Committee on Senate Bill 1869, pages 460-464.

30. 11 U. S. C. A. § 1200-1255.

31. Moody's Steam Railroads (1942) 120.

tionally protected value of at least $33,287,546.[32] All parties except the Institutional Bondholders' Committee and Reconstruction Finance Corporation have supported this position and two or more reorganization proposals predicated on this approximate valuation were under consideration by the Commission, but all were rejected. As the Court is advised by briefs of other counsel, the Interstate Commerce Commission, without reporting any value for the Debtor's properties, proposed a plan providing for a total capitalization of $97,712,654 (taking no par value stock at $100 per share) all of which is allocated to holders of the Debtor's Bonds and secured notes and the holders of Trustee's Certificates without any provision for the Debtor's unsecured debt and capital stock.

Commissioner Miller, a member of Division 4 (Finance) of the Commission, dissented. We quote from his dissenting report:

> "In connection with capitalization the majority state
>
> > It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company.
>
> With this conclusion I can not agree but am strongly of the view that the capitalization should be generally on the basis of original cost less depreciation amounting to something over $120,000,000, which is about the same as is proposed in two of the three plans referred

32. The constitutionally protected value is believed to be substantially in excess of $120,000,000 and not lower than the 19A value of $150,000,000. Tr. 1061-1063.

to in the above quotation. The no-par-value common stock may have little or no market value when the company is reorganized, but the issuance in the neighborhood of $30,000,000 more than the majority authorize would give the present stockholders a chance to participate in the future profits of the reorganized company."[33]

It will be assumed (the point is argued by other counsel) that if the value of the Debtor's properties as a whole determined in accordance with subsection (e) of Section 77 exceeds the principal amount of the Debtor's bonds and secured debt and Trustees' Certificates, together with interest accrued to the proper basic date, recognition must be given to the Debtor's unsecured debt, and if it exceeds the combined secured debt and unsecured debt, then also to its capital stock in any *lawful* plan of reorganization under Section 77. This seems implicit in the decision of this Court in *Consolidated Rock Products Company* v. *du Bois*, where it is stated in the opinion of Mr. Justice DOUGLAS:

> "In view of what we have said, it is apparent that a determination of that value must be made so that *criteria* will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole."[34]

The Debtor submits (a) that upon the facts of record as to which there is no issue or dispute, there can be no lawful value for purpose of expropriation whether by eminent domain or decree in bankruptcy or other forcible divesture below $120,000,000, and (b) that earning capacity

33. Tr. 283, 284.

34. 312 U. S. 510.

established since the record was closed in the Interstate Commerce Commission, which is before the Court by stipulation but of which it would take judicial notice without such stipulation, reflects a constitutionally protected value in excess of $120,000,000.

We will discuss each of these propositions in its order.

(a) Valuation on basis of facts of record. Subsection (e) of Section 77 specifies various factors including "earning power of the property, past, present and prospective" which are to be considered in a determination of value under Section 77, but the specification of earning power is safeguarded by a reference to "the law of the land." By the reference to the law of the land the protection of the Fifth Amendment is read into Section 77 and recognition given to the rule asserted by the Court in *Monongahela Navigation Company* v. *United States*[35] that it does not lie within the competency of Congress to prescribe the test of the property value protected by the Constitution. Included within this protection, when, as here, confiscation is involved, is the right, as held by this Court in *Crowell* v. *Benson*[36] to submit "that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."

The following facts are not in dispute and are covered by the Stipulation of Facts and by the Supplemental Record in the District Court, including the System Income Accounts to July 31, 1942:

(1) That the depreciated cost of the Debtor's properties was, as of December 31, 1938, in excess of $120,000,000.[37]

35. 148 U. S. 312.
36. 285 U. S. 22.
37. Tr. 283, 284; 1044-1047; 1062-3; 1114.

(2) That the properties of the Debtor and its subsidiaries are valued by the Interstate Commerce Commission under its drastic Section 19A valuation methods at more than $150,000,000.[38]

(3) That the Debtor's properties have been rehabilitated at a cost of $18,000,000 and henceforth may be operated economically and efficiently with only normal maintenance.[39]

(4) That the Debtor has recently opened up new routes which are profitable *per se* and are contributing greatly increased tonnage to the System lines.[40]

It is our fundamental contention that those factors establish a constitutionally protected value of not less than $120,000,000 which cannot be written down for the purpose of an expropriation of the property by an estimate of earning power based solely upon regulated past earnings; and, unless the Commission's action was wholly arbitrary, it is made clear by the simple process of elimination that such an estimate was the sole factor to which it could have resorted.

Certainly this must be true in the absence of positive evidence that earning power adequate to yield a return upon the capital prudently invested in the properties of the Debtor as they exist today was never realized or, if realized, has been permanently lost.

Facts comparable with those developed in the case of *Atlanta, Birmingham and Coast Railroad Company* v. *United States*,[41] would be necessary, assuming contrary

38. Tr. 1061-3.

39. Tr. 1052; 1984; 2161.

40. Tr. 1283-1288.

41. 296 U. S. 33.

to what we conceive to be due process of law that regulated earnings can be used at all in a determination of value as a basis for divesture of property.

That case is interesting in a double aspect.

First, it illustrates the category of purposes, all falling short of the expropriation or destruction of property or vested rights for which an administrative body may find and use a property value that cannot be disturbed by a Court unless the action is arbitrary and the finding unsupported by evidence.

Second, it illustrates the kind of factual foundation that would be required to support a finding of impaired or lost earning capacity.

It appeared that the property of the carrier had been actually acquired by another carrier and reorganized in equity and a new capital structure established which included an issue of common stock without par value; that the carrier had sought to place a book value on the new stock predicated upon the Commission's 19A valuation of the property, which was substantially in excess of the actual commercial valuation resulting from the arm's-length acquisition of the property by the Atlantic Coast Line; that the Commission's Bureau of Accounts insisted upon a lower book value somewhat related to the price at the foreclosure sale; and that this issue had finally reached the three-judge court provided for in the Urgent Deficiencies Act.[42] The Interstate Commerce Commission had, however, revalued the property for the purpose of fixing the book value of the new stock in accordance with the views of its own Bureau and in reaching its determination of value it had found among other things that the carrier's traffic—it had its origin in the consolidation of a group

42. 28 U. S. C. A. § 47.

of short line timber roads in Southern Georgia—was approaching exhaustion; that it could no longer earn the return to which it was entitled under its 19A valuation because of insufficient traffic and that its books should reflect its true financial condition. The case having arisen under the Interstate Commerce Act which made the authority of the Interstate Commerce Commission exclusive, the three-judge court held, and this Court affirmed the holding, that there being evidence to support the Commission's finding it was binding on the Court. The question was one of accounting which involved no taking or confiscation of property. The holders of the stock continued to own it and continued to have a constitutional right to earn and retain a fair return in the full 19A valuation of the property represented thereby if the finding of traffic exhaustion should prove erroneous. There was, however, a specific finding that the capacity to earn had been destroyed by exhaustion of traffic, whereas in the case of the Debtor there is not only no such finding or evidence to support such finding but there is positive evidence to the contrary.

In the State of Nevada for a distance of 178 miles the tracks of the Southern Pacific and those of the Debtor, each single track lines, are paired and operated jointly. The two companies use the Western Pacific tracks for all east bound traffic and the Southern Pacific tracks for west bound traffic. The expenses of operation are divided as to the number of cars of the two companies operating over the joint or paired tracks. This has necessitated accurate records of all car movements over this section which incidentally is a complete record of all business moving between the Great Salt Lake and the Sierra Nevada Mountains and its division between these two competing Systems. Charles Elsey, the Debtor's President testified, and his testimony was confirmed by the late Col. J. W. Williams,

the Debtor's Chief Engineer, that the physical condition of the property was better than it ever was in its history with reference to its ability to handle efficiently the traffic tendered to it or to handle a substantially increased traffic, but that it was only moving *one* car out of every *four* over the joint track. *It is apparent therefore that there has been no dearth of business moving between the east and west termini of The Western Pacific Railroad Company and that its only problem is to increase its proportion.* President Elsey further submitted figures based upon traffic over the paired track for the fifteen year period 1924-1939 showing that the Southern Pacific Company started in 1924 with 77.17% of the business against Western Pacific's proportion of only 22.83%, and that from year to year thereafter (with but few exceptions) the Southern Pacific's percentage progressively decreased and the Western Pacific's percentage progressively increased, so that in 1939 only 72.78% of the business moved Southern Pacific and 27.22% was transported by Western Pacific.[43]

Since at the time of the Court hearing the Debtor was moving only one car out of every four passing over the paired track, which represents the great bulk of the Debtor's business, and since it has consistently increased its proportion over the long period to which the data relates, the natural conclusion is that it will continue in the future as in the past to gain progressively on its competitor and if it increases its proportion from one car out of four to one and one-half cars out of four the indicated increase in its total railway operating revenue would approach 50%. If it gains only one-fourth of a car, the increase in railway operating revenue would approach

43. Tr. 1283-1288, 1530. The percentages supplied by the Trustees since the close of the record are:

1940—	S. P. 72.37%	W. P. 27.63%
1941—	S. P. 71.86%	W. P. 28.14%

25%. What this would mean in increased income available for interest and dividends if not measurable is at least suggested by the account of system operations for 1941 compared with 1940 filed herein under Stipulation, which shows that an increase of 27.74% in operating revenue in 1941 over 1940 resulted in an increase in income available for interest and dividends in the amount of $1,897,341.[44] This is in excess of 12% on the capitalization above that proposed by the Commission (taking no par stock at $100) necessary to bring the total up to the minimum of $120,000,000 required by every legally admissible factor in a valuation.

For the foregoing reasons, the Debtor submits in confidence that the action of the Interstate Commerce Commission in seeking to extinguish the equity of its unsecured creditors and stockholders was, in the light of all relevant facts as of October 10, 1938, unsupported and confiscatory.

There remains for consideration the impact of subsequent economic changes.

(b) Established earning power reflects constitutionally protected value above $120,000,000.

As already pointed out, the income accounts of the Debtor's properties for the period from the closing of the record in the Interstate Commerce Commission up to and including July, 1942, are before this Court under Stipulation and independently of the Stipulation as part of its judicial knowledge of the economic history of the period.

The chart forming part of the brief of counsel for the Western Pacific Railroad Corporation (Judge Sloss) shows that the Debtor was passing through the low point of the decade of depression culminating in the secondary reaction of 1938 when the Interstate Commerce Commission ap-

44. Statement of System Operating Results for 1941, dated February 7, 1942, filed February 17, 1942.

proved the plan which afterwards, with only minor modification, was certified to the District Court, and that at the effective date of the Plan the Debtor was definitely on the upgrade.

In 1940, income for fixed charges amounted to $2,653,396.96, an increase over 1939 of $1,268,882.43.[45] In 1941 income available for fixed charges reached $4,551,737.93.[46] This is only slightly less than 4% upon $120,000,000, which the Debtor maintains is the minimum value which may lawfully be placed upon its properties. This figure, however, understates the true available income since it is depressed by retroactive wage adjustments not compensated by rate increases afterwards granted. In the six months' period January-June, 1942, the income available for fixed charges amounts to $4,080,090.[47] This is only $471,647 below what was earned in the full calendar year 1941. Transcontinental railway revenues are invariably heavier in the last half of the year. In 1941 more than 75% of the total year's income was earned in the last six months. If this ratio is maintained throughout 1942, income available for fixed charges should reach $10,000,000. The statement for July, 1942, the latest one filed, shows an increase in revenues over July, 1941, of 48.80%.[48] If this rate of increase persists (and there is every indication of a higher rate) income available for fixed charges for the calendar year 1942 should exceed $10,000,000.

The Petitioners who are supporting the Commission's plan and would, if it is made effective, acquire by allot-

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45. Statement of System Operating Results for 1941, dated February 7, 1942, filed February 17, 1942.

46. Statement of System Operating Results for 1941, dated February 7, 1942, filed February 17, 1942.

47. Statement of System Operating Results January 1—June 30, 1942, dated August 12, 1942, filed August 22, 1942.

48. Statement of System Operating Results for July, 1942, dated September 16, 1942.

ments of new common stock a very large part of the equity which the Debtor contends belongs to its unsecured creditors and stockholders, insist that current income is not in any sense a measure of true earning capacity but is an incident of the war and must be summarily dismissed from the discussion; that it will end when the war ends and may not be given weight in a permanent valuation of the Debtor's properties.

Contrary to this contention with which the Debtor is in fundamental disagreement, it is submitted that the capacity of the railway transportation systems of the country to assume and to carry the hitherto undreamed of burdens of the present war offers conclusive proof of the kind of earning power referred to in subsection (e) and equally significant proof that these properties have been maintained and equipped not in relation to supposed normal demands or to normal levels of railway operating revenue but in relation to the maximum service that they may render to the public in any great emergency. Railways were fitted into our national economy for private ownership and operation with the knowledge that their earnings would rise and fall with the trends of commercial and industrial activity, but that they nevertheless must stand ready at all times to meet the maximum demand. In the present war emergency they have displayed both a capacity to serve and a capacity to earn and it would be incredibly unjust to forfeit their properties on the theory that their true power of usefulness will only be sporadically invoked.

No one can say, however, that the present day prosperity of the railway industry will end when the war ends. Many economists believe it will increase when the war ends and the United Nations enter upon the stupendous task of rebuilding what has been destroyed and creating a new

economy designed to revolutionize the trade and commerce of the world.[49] Much of this prosperity (as will be demonstrated by data to be submitted to this Court) is not attributable at all to the increased traffic due to the war but is the result of recent advances in the art of railway transportation and the capacity of the carriers to convert a very much higher percentage of their railway operating revenue into distributable *Net Income*. This, of course, is a permanent accretion to the earning power of the carriers.

Much of the present prosperity of the railways is due to the elimination of pre-war competition which was destructive and unsound and may never be restored. The Transcontinental Railways particularly have benefited by

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49. The following release cabled on September 20, 1942, was made to the British Press by The Honorable Oliver Lyttleton, Chief of British War Production:

"Perhaps this war will turn out to have been far more constructive, even materially, than it has been destructive. The trouble is that most of us do not understand the colossal capacity this modern world has for recreating its wealth, for reconstruction and for production.

I once made a calculation that between the two wars—1914 and 1939—technical improvements in the production of non-ferrous metals such as copper, tin, lead, zinc, etcetera, recreated in that one industry alone more wealth than was destroyed by all the belligerents during the whole of the last war.

One of our troubles is that we take a too deflationary view. We seldom remember that from the year 800 to 1800 advance in the sciences of production was so slow that one could almost say it did not exist. Then from 1800 to 1900, with steam, steel and electricity, the advance was extraordinarily rapid.

But the advance from 1900 to 1942 was infinitely faster. We cannot even measure the ability we have now to produce.

The change-over from war industries to peace industries ought to be extremely simple. Markets will be enormous—bigger than ever before in world history. Take textiles for example. There is today probably not one yard of cloth on the shelves of merchants or in government stores from the eastern boundary of Russia at Vladivostok to the southern tip of Spain. It would take four years of unremitting full time work of all the textile factories now in existence to get the population of Europe back to its peace-time stock of textiles.

Think of the immense demand for building, not only to repair damage done but to catch up with buildings needed but not built during the war.

If labor is redistributed skillfully and our means of exchange are adjusted to our power to produce, then the postwar world ought to see a very great economic renaissance."

cessation of the competition of the Panama Canal. Many well informed persons believe that the Canal will be permanently withdrawn by the Government from commercial operation; but even if Canal competition is ultimately restored it may well be that for many years after the war ends the available vessels can be more profitably utilized in foreign commerce and it is reasonable to assume if full commercial operation of the Canal ever is resumed that tolls will be elevated so as to eliminate concealed subsidies and more truly reflect the cost of the service.

Reasons could be multiplied almost indefinitely to support the view that the existing peak demands for rail transportation service will continue after the war for a period measurable by decades rather than by years. That period will necessarily be one of construction and reconstruction unparalleled in history. No one could possibly predict either its breadth or its duration. Included in the vast economy will be the rebuilding of a world's merchant marine to take the place of what is now being destroyed; the replacement of millions upon millions of motor vehicles whose service lives already are nearing their end; the restoration of maintenance already long deferred and as the war progresses certain to be cumulating in factories, in homes, on farms and in almost every other ramification of the peacetime existence of all civilized peoples.

All of this is indicative of a long lasting era of maximum utility for the rail transportation system of our country adequate to sustain for an indefinite period the present level, if not an even higher level, of railway earnings—but however this may be surely this Court will not permit constitutionally protected investments in the great rail transportation industry to be forfeited because the Interstate Commerce Commission entertains a fear that at some

time in the future our country may suffer the visitation of another depression.

Conclusion

The Debtor asks that the proceeding be referred back to the Interstate Commerce Commission under a mandate to approve a new plan of reorganization which will give it the relief contemplated by Section 77.

Respectfully submitted,

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October 1, 1942.